of a superior Court of Law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but at all events it must be done clearly. It is not to be assumed that the Legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied, but necessarily implied."

In the second place, O. 72 r.2 provides that —

" Where no other provision is made by any written law or these Rules, the present procedure and practice in England or in Malaya remain in force."

It is at least permissible to call in aid the provisions of the present English Order 42 rule 19, which in fact does not conflict with the practice heretofore followed in Malaya in making an order for stay of execution upon granting leave to pay by instalments.

In the present case the defendants have set out in the affidavit of their managing partner special circumstances of hardship which render it inexpedient to enforce the judgment forthwith. Their difficulties have arisen largely by reason of the tin restriction scheme, which has had immediate detrimental effects on the tin industry, but in the long run, and before long, when the scheme gets into proper working order, its beneficial effects on tin miners may well prove its worth. The defendants have offered to increase the amount of monthly instalments to $300. They have also made full disclosure of the firm's assets and liabilities, and that other judgment creditors have stayed their hands. There is no very serious danger of the plaintiff losing the fruits of his judgment, or any likelihood of his being better off if the defendants should be forced into bankruptcy. Finally, if there is any material change in the circumstances, the plaintiff may at any time apply to Court for variation or rescission of the order.

For the above reasons, I will give the defendants leave to pay the amount of the judgment by monthly instalments of $300 with effect from 1st September, 1958, and thereafter on or before the 1st day of each succeeding month; in the event of default in payment of any instalment by the due date, execution to issue for the whole balance then outstanding. Costs of this application to the defendants assessed at $100. The defendants will have liberty to apply.

Order accordingly.

Solicitors: *Eugene Lye & Hoh; Bannon & Bailey.*

KHO TENG HOOI v. THE BRITISH INDIA GENERAL INSURANCE CO. LTD.

[O.C.J. (Ong J.) November 7, 1958]

[K.L. — Civil Suit No. 322 of 1957]

Damages — Fatal Accident — Insurance Policy — Clauses in — " Whilst under the influence of intoxicating liquor or drugs."

This was a suit by the administrator of the estate of one Khoo Teng Oon, deceased, who died in a road accident while driving his motor-car along Treacher Road, Kuala Lumpur, on the night of 24th June, 1956. The defendant is the Insurance Company with whom the car was insured, and the claim was firstly for the value of the motor-car which was a total wreck, and secondly, upon an endorsement to the Policy pertaining to what is called "Increased Private Car Benefits", whereby the Insurers undertook to pay compensation to the insured or his personal representative for bodily injury sustained by the insured whilst using his said motor-car. The agreed value of the motor-car was $4,550 and the amount of compensation payable upon the death of the insured was $10,000. There was no dispute as to the quantum, in the event of judgment being given for the plaintiff.

The defendant repudiated liability on the ground that at the time of the accident the deceased was driving his motor-car whilst under the influence of intoxicating liquor.

The relevant clauses in the policy were as follows:

(a) " The Company shall not be liable to make any payment in respect of loss or damage arising whilst such motor-car is being driven by the insured..... whilst under the influence of intoxicating liquor or drugs";

(b) " No compensation shall be payable in respect of death or injury directly or indirectly wholly or in part arising or resulting from or traceable to.....an accident happening whilst the insured is under the influence of intoxicating liquor or drugs."

Held: on the evidence the deceased was in a state of pronounced intoxication and the claim was accordingly dismissed.

Cases referred to:—

(1) *Breithaupt v. Abram,* (1957) 352 U.S. 48.

(2) *Mair v. Railway Passengers Assurance Co. Ltd.* (1877) 37 L.T. 356 at p. 358.

CIVIL SUIT for damages.

S. D. K. Peddie for the plaintiff.

R. H. V. Rintoul for the defendant.

Cur. Adv. Vult.

Ong J.: — This is a suit by the administrator of the estate of one Khoo Teng Oon, deceased, who died in a road accident while

driving his motor-car along Treacher Road, Kuala Lumpur, on the night of 24th June, 1956. The defendant is the Insurance Company with whom the car was insured, and the claim was firstly for the value of the motor-car which was a total wreck, and secondly, upon an endorsement to the Policy pertaining to what is called "Increased Private Car Benefits," whereby the Insurers undertook to pay compensation to the Insured or his personal representative for bodily injury sustained by the Insured whilst using his said motor-car. The agreed value of the motor-car was $4,550 and the amount of compensation payable upon the death of the Insured was $10,000. There is no dispute as to the quantum, in the event of judgment being given for the plaintiff.

The defendant repudiated liability on the ground that at the time of the accident the deceased was driving his motor-car whilst under the influence of intoxicating liquor. The relevant clauses in the Policy are as follows:

(a) "The Company shall not be liable to make any payment in respect of loss or damage arising whilst such motor-car is being driven by the insured.....whilst under the influence of intoxicating liquor or drugs";

(b) "No compensation shall be payable in respect of death or injury directly or indirectly wholly or in part arising or resulting from or traceable to.....an accident happening whilst the insured is under the influence of intoxicating liquor or drugs."

The only issue in this case therefore is: whether the deceased was under the influence of intoxicating liquor at the time he received the injuries resulting in his death. Whether or not the deceased was driving negligently is irrelevant, except that the nature and circumstances of the accident should be looked at in so far as they tend towards proving or disproving that the man was under the influence of intoxicating liquor at the time.

The facts admitted are: the accident was caused by the motor-car, driven by deceased, leaving Treacher Road, at that place 23 feet wide, and colliding with a tree situate 9 feet from the off-side of the road along which the vehicle was travelling, and it came to rest 17 feet from the off-side of Treacher Road. Along that road the restricted speed limit was 30 miles per hour. The deceased died at 11.40 p.m. on the night of the accident and a post-mortem was duly performed on his body.

As the onus of proof rested on the defendant, counsel for the Company called the Police Investigating Officer, Corporal 745, who produced the sketch plan he had made and gave evidence that the road was dry and that no brake marks were visible thereon. He identified the deceased's body to the Doctor conducting the post-mortem, and from the latter received three samples comprising blood, urine and stomach contents; which he duly delivered to the Government Chemist. Dr. Balasingam, Medical Officer at the General Hospital, Kuala Lumpur, gave evidence of the post-mortem performed by him and of his personally taking from the deceased's body the said samples of blood, urine and stomach contents, which he sealed in containers in the presence of Corporal 745 for delivery to the Department of Chemistry. He asserted that there was no possibility of the samples being contaminated, and that he did not use any spirits in sterilising his instruments. On these points his evidence was not seriously challenged, and I find as a fact that the said samples, which were analysed by Mr. Calderbank, the Government Chemist, came from the body of the deceased. The certificate of analysis (Ex.D.3) reads as follows:

"I, KINGSLEY EDWARD CALDERBANK, Chemist, Federation of Malaya do hereby certify that at 8.50 a.m. on the 26th day of June, 1956 there were handed to me by Cpl. 745, three specimens marked "A – C" and sealed "FIRST CIVIL HOSPITAL, KUALA LUMPUR". I examined the specimen of blood and found it to contain 521 milligrammes of ethyl alcohol per 100 millilitres of blood. In the urine I found a concentration of 369 milligrammes of ethyl alcohol per 100 millilitres of urine. These figures for alcohol content of the blood and urine respectively are discrepant and no reliable conclusion can be drawn as to the degree of intoxication.

However, I found 5 millilitres of alcohol in the stomach contents and this is consistent with either of the above figures which would at least indicate pronounced intoxication."

Both the Government Doctor and Government Chemist were subjected to very detailed cross-examination by learned counsel for the plaintiff on the strange and exceptional discrepancy between the amount of alcoholic concentration in the blood and in the urine; the normal ratio between them according to leading text-books on medical jurisprudence, should be 1 to $1\frac{1}{3}$, whereas the Chemist's certificate showed that 521 milligrammes and 369 milligrammes were found in each 100 millilitres of the blood and urine samples respectively. The expert witnesses were unable to explain this discrepancy satisfactorily. Counsel for the plaintiff has consequently asked me to disregard the certificate altogether on the ground that, since the deceased could not have had that amount

of alcohol in his blood without being on the verge of coma, if not in actual coma, which he was not, the analysis of the blood sample was therefore unreliable, and consequently the analysis of the urine sample should also be rejected altogether. Counsel for the plaintiff further submitted that no weight should be attached to the Chemist's certificate in the face of evidence given by the six witnesses called on behalf of the plaintiff who had testified to spending the evening in the company of the deceased, to how little alcohol (and that only in the form of beer) the deceased had consumed before the accident, and to his behaviour and speech generally, which all the witnesses unanimously described as normal.

Were the Chemist's certificate otherwise, I would be most hesitant in not accepting the evidence of these witnesses at their full face value. Had the analysis showed a mild or moderate degree of alcoholic intoxication, I should have been faced with the problem of having to draw the line somewhere.

In this case no evidence has been given as to the deceased's ordinary reaction to alcohol. *Glaister* says in his "Medical Jurisprudence & Toxicology" (9th ed.) at p. 627:

> "There is no statutory definition of drunkenness in the laws of Great Britain. This is due no doubt to the difficulty of defining the phenomena of alcoholism as exhibited by different individuals, or by the same individual at different times. It is well known that the same individual can react differently to the same amount of alcohol under different circumstances, and that the same quantity of alcohol will produce different effects on different people under the same circumstances. Moreover, certain factors, such as the presence of food in the stomach, physical or mental fatigue and the administration of certain drugs, can materially influence the absorption and action of the drug."

According to the evidence the deceased went to a Chinese wedding dinner that evening at the Bukit Bintang Park. On his table, as on the others, had been placed a bottle of brandy. However, that bottle was untouched, and the 3 witnesses who shared the same table with him deposed that 2 persons shared with the deceased only one large bottle of beer, which was taken mixed with ginger ale. There was no further consumption of alcohol by him or them. The deceased took a stroll round the Park after the dinner, then he drove some friends home to an address in Batu Road, by way of Ampang and Campbell Roads, and returned safely to the Bukit Bintang Park (covering a total distance, I understand, of not less than 5 miles), and finally when sending home some relatives on a second journey he met with the fatal accident about 1 mile from the Park. Not only had he thus shown himself able to drive safely, but the witnesses were unanimous that there was nothing in his manner, behaviour or speech to suggest that he was otherwise than quite normal and free from any sign of alcoholic intoxication. The accident, according to a witness who was in the car (P.W.1), was due to the deceased swerving to avoid an object crossing the road from right to left, about 40 feet ahead, which object the witness "thought" was a dog, adding, when pressed further, "I did see the dog." If I accept all this evidence, I must of course find for the plaintiff. I can only do so, however, if I reject in toto the evidence of the analysis of the samples of the blood, urine and stomach contents taken from the body of the deceased.

In a case in the United States Supreme Court, *Breithaupt v. Abram*[1] that Court pointed out:

> "Forty-seven States use chemical tests, including blood-tests, to aid in the determination of intoxication in cases involving charges of driving while under the influence of alcohol"

and Mr. Justice Clark, delivering the opinion of the Court, said that the test in that case —

> "admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication."

Glaister at p. 628 says:

> "There is no single test by itself which would justify a medical practitioner in deciding that the amount of alcohol consumed had caused a person to lose control of his faculties to such an extent as to render him unable to execute safely the occupation on which he was engaged at the material time."

He continues at p. 631:

> "From the examination of the blood and urinary alcohol it can be shown that the individual had consumed alcohol very recently; that there is present in the blood and urine a concentration of alcohol which is, or is not, consistent with a state of insobriety; that a certain minimum amount of alcohol has been consumed."

Lastly, at p. 633:

> "From these estimations the probability or otherwise of intoxication being present can be gauged, but the estimation by itself cannot always be taken as a certain indication that a condition of insobriety exists. The clinical examinations must still remain the determining factor in arriving at a final diagnosis, and the laboratory observation is to be considered as an adjuvant."

Clinical examination, in this case, as the determining factor, was naturally out of the question except that Dr. Balasingam was present when the deceased was admitted unconscious

and he said that the deceased's breath smelt of alcohol. The deceased was admitted into Hospital at 11.15 p.m. with multiple fractures of the skull and other serious bodily injuries from which he died 25 minutes later.

The value of laboratory tests being generally accepted, I feel that I should not be justified in rejecting the certificate altogether, but that I should regard the laboratory observation only as an adjuvant, in the first place, and, in the next place, proceed to examine the rest of the evidence to see whether any, and if so what, evidence lends probability to its being a true description of the state of the deceased's alcoholism.

In *Mair v. Railway Passengers Assurance Co. Ltd.*(2) which was a claim upon a policy of life assurance, a similar exception clause fell to be considered, and Lord Coleridge C.J. (with whom Denman J. agreed) stated his opinion as follows:

"I should think, speaking only for myself, that the words 'under the influence of intoxicating liquor' would be sufficiently satisfied by construing them to mean under such influence of intoxicating liquor as disturbs the balance of a man's mind. There is a point up to which any stimulating liquor, with most people at least, possibly benefits, at any rate for the time, the exercise of the intellect. There is a point beyond which it certainly impedes — disturbs it. I concede that it is very difficult even in language — certainly in the English language — to ascertain with precision where that point is; but it is enough to say that there is a point, and it seems to me these words would be satisfied when the influence of intoxicating liquor is found in point of fact to be such as to disturb the quiet and equable exercise of the intellectual faculties of the man who has taken the liquor."

With that interpretation of the proviso I respectfully agree. It does not solve, and does not purport to solve, the difficulty of application to the circumstances of border-line cases. This, however, is not one of them.

In this case it was urged on the defendant's behalf that, according to Mr. Calderbank, (D.W.2) the urine was a true sample, which the blood was not; that in any case, contamination of the samples had been negatived; that individual reactions to alcohol cannot be laid down in general terms, and in the case of the deceased the effects of the alcoholic consumption might have been delayed by the events of that evening; that it was possible for the deceased to have taken a further quantity of alcohol between his first journey from the Park to Batu Road and his setting out on the fatal second journey — this I do not think to be likely — and that lastly the circumstances of the accident speak for themselves.

As to the accident, the witness P.W.1 did not impress me as credible when giving his explanation for the swerve. He said, "I saw an object crossing from the right to the left. I think it was a dog." In cross-examination he repeated, "The object I saw was crossing road 40 feet ahead of us," and further on, "I think the object I saw was a dog." When asked why he should think he saw a dog, then only did he say "I did see the dog." If there was in fact no dog, then there was no accounting for the motor-car going off the road as it did, unless the deceased was under the influence of alcohol. This witness who had just left school spoke good English, and I must say that his description lacks a certain quality one would have expected of an eye witness account such as, the suddenness, the speed or manner in which the dog crossed the road. To go a step further, even if there was a dog, (and I do not so hold), the nature of the accident was in my opinion more consistent than not with the deceased being then appreciably under the influence of alcohol. The deceased had been driving for at least 5 years, he had owned and driven the same car since 10th February, 1956, he was driving along a speed-restricted road with which he must have been very familiar, the road was dry, and clear of any oncoming traffic, and unless he was going at an excessive speed he could have had time to apply his brakes. According to P.W.1 the car was going at a speed at which any driver, if normal, could control it. The accident itself lends verisimilitude to the analysis made by the Government Chemist. As between two sets of witnesses I prefer the testimony of independent Government officers. There was no suggestion of any impropriety in the taking of the samples. The quantity of alcohol found in the stomach contents was consistent with either the blood or urinal analysis, and whether I accept either or both, the deceased was in a state of pronounced intoxication and I do so find.

The claim is accordingly dismissed. Costs will follow the event.

Claim dismissed.

Solicitors: *Bannon & Bailey; Shearn Delamore & Co.*